TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 230.

HENRY C. HYDE, ASSIGNEE OF T. W. FENN, A BANKRUPT, PLAINTIFF IN ERROR,

vs.

FRANK H. WOODS AND JAMES FREEBORN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED NOVEMBER 7, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 230.

HENRY C. HYDE, ASSIGNEE OF T. W. FENN, A BANKRUPT, PLAINTIFF IN ERROR,

vs.

FRANK H. WOODS AND JAMES FREEBORN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Citation	*a*	1
Writ of error	*c*	1
Answer	12	6
Bond	41	17
Complaint	4	3
Findings	20	9
Judgment	27	12
Opinion	30	13
Clerk's certificate	43	18

a UNITED STATES OF AMERICA, *ss:*

To Frank H. Woods and James Freeborn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein Henry C. Hyde, as assignee of T. W. Fenn, a bankrupt, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, this first day of October, A. D. 1874, and of the Independence of the United States the ninety-ninth.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

b Service of a copy of the within citation this day admitted.
W. H. L. BARNES,
Attorney for Defts. in Error.

OCTOBER 3D, 1874.

(Indorsed:) No. 1191. United States Supreme Court. Henry C. Hyde, assignee, &c., vs. Frank H. Woods and James Freeborn. Citation. Filed Oct'r 1st, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of California, in the ninth judicial circuit, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you between Henry C. Hyde, as assignee of T. W. Fenn, a bankrupt, plaintiff in error, and Frank H. Woods and James Freeborn, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this second Monday of October, in the year

of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-ninth.

[SEAL.] Attest, &c. L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

d The answer of the judges of the circuit court of the United States for the district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

(Indorsed:) United States Supreme Court. Henry C. Hyde, assignee, &c., vs. Frank H. Woods et al. Writ of error. Filed October 1st, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

1 UNITED STATES OF AMERICA:

Summons.

In the circuit court of the United States, of the ninth circuit, in and for the district of California.

HENRY C. HYDE, ASSIGNEE OF T. W. Fenn, a bankrupt, plaintiff, *vs.* FRANK H. WOODS AND JAMES FREEBORN, defendants.	Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

The President of the United States of America to Frank H. Woods and James Freeborn, defendants, greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein, (a copy of which accompanies this summons,) in the office of the clerk of said court in the city and county of San Francisco, within ten days after the service on you of this summons if served in this county, or if served out
2 of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to recover from you the sum of ten thousand dollars in United States gold coin, together with interest thereon from the 18th day of September, A. D. 1872, and costs of this action. The said sum of ten thousand dollars is alleged to be due and payable to Henry C. Hyde, plaintiff, as assignee of said bankrupt; all of which is more fully set out in the original complaint on file herein, to which reference is hereby made. And if you fail to appear and plead, answer, or demur as herein required, judgment by default will be entered against you and each of you.

Witness the honorable N. Clifford, associate justice of the Supreme Court of the United States of America, this 11th day of October, in the

year of our Lord one thousand eight hundred and seventy-three and of our Independence the ninety-eighth.

SEAL OF U. S. CIRCUIT COURT, DIST. OF CAL.

LORENZO S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

(Endorsed:)

OFFICE OF U. S. MARSHAL,
District of California.

I hereby certify that I received the within summons on the 20th of October, A. D. 1873, and that I served the same by personally delivering a certified copy thereof to James Freeborn, and a certified copy together with a certified copy of the complaint therein mentioned
3 to Frank H. Woods, both in the city and county of San Francisco, on the 20th day of October, A. D. 1873.

WM. GOUVERNEUR MORRIS,
U. S. Marshal,
By B. J. AKERMAN, *Deputy.*

GEO. B. MERRILL, Esq.,
Plaintiff's Attorney.

Filed 21st October, 1873.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

4 *Complaint.*

In the circuit court of the United States, ninth circuit, district of California.

HENRY HYDE, AS ASSIGNEE OF T. W. FENN, A bankrupt, plff.,
vs.
FRANK H. WOODS AND JAMES FREEBORN, DEFTS.

The plaintiff, Henry C. Hyde, complains against the defendants, Frank H. Woods and James Freeborn, and for cause of action alleges that the above-named defendants were, at all the times and dates hereinafter mentioned, copartners, doing business in the city and county of San Francisco, in the district aforesaid, under the firm-name of Woods and Freeborn, and were creditors of T. W. Fenn hereinafter mentioned; that T. W. Fenn was, on the 18th day of September, A. D., 1872, a stock-broker, resident and doing business in the district aforesaid; that on said last-named day, said Fenn became and was a bankrupt within the meaning of the act of Congress of the United States, entitled "An act to establish a uniform system of bankruptcy through-
5 out the United States," approved March 2d, A. D. 1867; that thereafter, to wit, on the 1st day of October, A. D., 1872, upon the petition of Fred. W. Eaton, a creditor of T. W. Fenn, theretofore filed in this court, he, the said T. W. Fenn, was duly adjudicated bankrupt; that thereafter, to wit, on the 1st day of November, A. D. 1872, the plaintiff was duly appointed assignee in bankruptcy of the estate of said bankrupt, and he was thereafter, to wit, on the 13th day of November, A. D. 1872, duly qualified as such assignee, and thereupon entered upon his duties as such assignee, and has ever since acted, and

is now acting, as such assignee; that on the 13th day of November, A. D. 1872, Samuel J. Clark, jr., esq., the register in bankruptcy of this district, having jurisdiction in the matter, executed and delivered to the plaintiff a deed of assignment, a certified copy of which has been duly filed in the office of the clerk of this court, in accordance with the rules and orders of the Supreme Court of the United States in bankruptcy, and a copy of which deed is hereunto annexed, marked "A," and made a part hereof, whereby all the estate, real and personal, of which the said bankrupt was seized or possessed on the 20th day of September, A. D. 1872, (the day on which the proceedings in bankruptcy were commenced,) all the property conveyed by said bankrupt in fraud of his creditors, all rights in equity, choses in action, patents and patent-rights, and copyrights, all debts due to him, or to any person for his use, and all liens and securities therefor, all his rights of action
6 for property in estate, real or personal, and for any cause of action which said bankrupts, or either of them, had against any person arising from contract, or from the unlawful taking or detention of the property of the bankrups, or either of them, and all the rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover, or defend the same as the said bankrupt might or could have had if such assignment had not been made, became and were, on said last-named day, vested in said plaintiff, assignee as aforesaid; that on the 18th day of September, A. D. 1872, the said T. W. Fenn was insolvent, and being so insolvent, with a view to a preference to said defendants' creditors as aforesaid, did, on said day, being within four months before the filing of the petition against said bankrupt as aforesaid, make payment to them, the said defendants, of the sum of ten thousand dollars in United States gold coin, the money of him the said T. W. Fenn; that at the time of said payment the defendants had reasonable cause to believe that said T. W. Fenn was insolvent, and that said Fenn was largely indebted to divers persons, and had reason to believe that said payment was made with a view to a preference to them, the defendants, and in fraud of the provisions of the act of Congress above named.

And plaintiff further alleges that the said T. W. Fenn, at the
7 time hereinbefore mentioned, being at that time indebted to said defendants, and being the owner of the money hereinbefore mentioned, and being then and there insolvent, and in contemplation of insolvency, made payment of said sum of money to said defendants for the purpose and with the intent of preferring said defendants, and with the intent and for the purpose of preventing said money from coming into the hands of the said assignee in bankruptcy; that the defendants, at the time of receiving said payment of money, had reasonable cause to believe said T. W. Fenn to be insolvent, and that he was acting in contemplation of insolvency, and had reasonable cause to believe that said payment was made to them with a view to prevent the said money from coming into the possession of his assignee in bankruptcy, and to prevent the same from being distributed under the act of Congress above named, and to defeat the object of and to impair, hinder, and delay the operation of the said act, and to evade the provisions thereof.

And plaintiff alleges that he is entitled to the said sum of ten thousand dollars, and interest thereon from the said 18th day of September, A. D. 1872, and that since his appointment and qualification as assignee as aforesaid he has demanded from the said defendants the return of said money; but that though often requested, defendants have failed

and refused, and still do fail and refuse, to pay to plaintiff the said money or any part thereof.

8 Wherefore plaintiff prays for judgment against said defendants for the sum of ten thousand dollars in United States gold coin, together with interest thereon from the 18th day of September, A. D. 1872, and costs of this action.

GEO. B. MERRILL,
Plff.'s Attorney.

UNITED STATES OF AMERICA,
District of California, ss:

Henry C. Hyde, the plaintiff, being first duly sworn, deposes and says that he has read the foregoing complaint, and knows the contents thereof, and that the same is true, except as to the matters which are therein stated on his information or belief; and as to those matters that he believes it to be true.

H. C. HYDE.

Subscribed and sworn to this 10th day of August, A. D. 1872.
JOS. F. O'BEIRNE,
U. S. Commr., Cal.

9 EXHIBIT A.

Assignment of bankrupt's effects.

In the district court of the United States for the district of California.

IN THE MATTER OF THOMAS W. FENN, of Oakland, Alameda Co., bankrupt. } In bankruptcy.

DISTRICT OF CALIFORNIA, *ss:*

Know all men by these presents that Henry C. Hyde has been duly appointed assignee of the estate of Thomas W. Fenn, of Oakland, in the county of Alameda and State of California, who has been adjudged bankrupt by decree of this court:

Now, therefore, I, Samuel J. Clarke, jr., one of the registers in bankruptcy for said district of California, by virtue of the authority vested in me by the fourteenth section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Henry C. Hyde, assignee as aforesaid, all the estate, real and personal, of the said Thomas W. Fenn, bankrupt, including all property, of whatever kind, of which he was possessed, or in which he was

10 interested or entitled to have, on the 20th day of September, A. D. one thousand eight hundred and seventy-two, together with all his deeds, books, and papers relating thereto, saving and excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act: to have and to hold all the foregoing premises to the said Henry C. Hyde and to his heirs forever: in trust, nevertheless, for the uses and purposes, and with the powers and subject to the conditions and limitations prescribed and set forth in said act.

In witness whereof I, Samuel J. Clarke, jr., register in bankruptcy as aforesaid, have hereunto set my hand and caused the seal of said district court to be affixed this 1st day of November, anno Domini one thousand eight hundred and seventy-two.

[L. S.] SAMUEL J. CLARKE, JR.,
Register in Bankruptcy.

I, Edward B. Cotter, clerk of the district court of the United States for the district of California, do hereby certify that the foregoing is a full, true, and correct copy of the original assignment in the above-entitled matter.

Attest my hand and the seal of said district court this 13th day of November, A. D. 1872.

EDWARD B. COTTER, *Clerk*,
By A. D. GRIMWOOD, *Deputy Clerk*.

(Endorsed:) Filed this 13th day of November, A. D. 1872. Edw'd B. Cotter, clerk of said U. S. district court, by A. D. Grimwood, deputy clerk.

11 (Endorsed:) Complaint. Filed October 10, 1873. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

12 *Answer.*

In the circuit court of the United States, ninth circuit, district of California.

HENRY C. HYDE, AS ASSIGNEE OF T. W. FENN, a bankrupt, plaintiff,
vs.
FRANK H. WOODS AND JAMES FREEBORN, defendants.

The defendants, Frank H. Woods and James Freeborn, answering the complaint of Henry C. Hyde, as assignee of Thomas W. Fenn, a bankrupt, plaintiff in this action, show to the court:

On their information and belief, they deny that on the day in that behalf alleged by plaintiff, Thomas W. Fenn became or was a bankrupt within the intent or meaning of the act of Congress of the United States, entitled or approved as in said complaint alleged, or otherwise.

They deny that on said day, or any day, the said Fenn, being insolvent within the meaning of the bankrupt-laws of the United States or otherwise, except as hereinafter stated, or with a view to a preference to these defendants or otherwise, either within the period of four months before the filing of the petition against said Fenn, as alleged in
13 said complaint, or at all, made payment to the defendants, or either of them, of the sum of ten thousand dollars in gold coin, or any other sum of money in any currency whatever, either of the money of said Fenn or of any other person. They deny that at the time of said alleged payment or at any other time the defendants had reasonable cause to believe that said Fenn was largely or at all indebted to divers persons, or had reason to believe that said alleged payment was made with a view to a preference to them or either of them, or in fraud of the provisions of the act of Congress, or that they had any knowledge or information of the affairs of said Fenn except as is hereinafter stated. On their information and belief they deny that the said Fenn at the time alleged, being then indebted to defendants or being the owner of said sum of money, or being then and there insolvent, or in contemplation of insolvency, or otherwise, made payment of said sum of money to them for the purpose or with the intent of preferring said defendants, or with the intent or for the purpose of preventing said money from coming into the hands of the said assignee in bankruptcy. They deny that at the time alleged or ever they had reasonable cause

to believe said Fenn to be insolvent, except as hereinafter stated, or that he was acting in contemplation of insolvency, or had reasonable cause to believe that said alleged payment was made to them with a view to prevent the said money from coming into the possession of his assignee in bankruptcy, or to prevent the same from being
14 distributed under said act of Congress, or to defeat the object of or to impair, hinder, or delay the operation of the said act, or to evade the provisions thereof. They deny that the plaintiff is entitled to said sum of ten thousand dollars, or any part thereof, with interest thereon from September 18, 1872, or any other time.

And for a further and separate answer and defense to the cause of action in said complaint contained, defendants allege as follows: That on the eleventh day of September, in the year 1862, certain persons in the city and county of San Francisco, State of California, formed themselves into a private association for the purpose of buying and selling shares of the capital stock of mining and other corporations, by the name of "The San Francisco Stock and Exchange Board," and adopted a constitution and by-laws for the regulation of all who should become members thereof; that the number of members of said association was limited, and all persons applying for admission to said association were, and have always continued to be, elected by ballot, and every applicant for admission was required to be proposed for membership at least five days preceding election, and five negative votes excluded any such applicant; that upon election each person so elected agreed to be and was bound by the articles of association, the constitution of said San Francisco Stock and Exchange Board, and its by-laws; that there never was, from the time of said organization of said board
15 to the present time, any ownership or property in the privileges of membership in said board, or the right to do business therein as a member thereof, except as provided in and limited by said articles, constitution, and by-laws, and the privileges granted to any one becoming a member were not assignable, descendible, or transferable except under the said constitution and by-laws of said board. And the defendants further say that in Article IX of said constitution it was provided as follows: "Any member who fails or has failed to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors; that on his application for re-admission a committee of three members shall be appointed by the president to investigate his conduct and the cause of his failure. The applicant shall then be admitted to his seat in the board upon the assent of two-thirds of the members there present."

That Article XIV of said constitution provided for the disposal of the seat of a member of said board and regulated the same as follows: "In case of retirement of any member in good standing from this board, he shall have the right to sell his seat to the best advantage, and to nominate his assignee to fill the vacancy; provided that said nominee shall thereby acquire no right or privilege until proposed and elected in the manner and form prescribed by the constitution of this board,
16 it being distinctly understood that this board reserves to itself the right to reject any or all nominees at its pleasure. Any member assigning his seat shall be entitled to the initiation-fee at the time, in case his nominee shall be elected by the board. In case of the death of a member, this board pledges itself to dispose of the vacant seat to the best advantage for the benefit of the widow and children of the deceased; and in case there be neither widow nor children, then for the benefit of such parties as the deceased may indicate in his last will and

testament. In case of the suspension of any member by failure to fulfil his contracts, or by insolvency, the board will exercise a generous discretion, guided by the circumstances of each case, of disposing of the seat for the benefit of the party suspended; provided that a party who accepts the proceeds of the sale of his seat under this resolution shall not be re-admitted except in the manner and form prescribed by the constitution and by-laws for the admission of new members. All members of this board who may have been suspended for six months and upwards, and who have not made a satisfactory settlement of their contracts during that time, shall be deprived of all privileges of membership at this board, and theirs seats become the property of their creditors in the board."

That Article XV of said constitution provided as follows: "In sales of seats for account of delinquent members the proceeds shall be
17 applied to the benefit of the members of the board exclusive of outside creditors, unless there shall be a balance after payment of the claims of members in full."

And the defendants further say that said Thomas W. Fenn became a member of said board on the twenty-first day of October, in the year 1871, and then and there pledged to said board and its members his privilege of doing business therein and therewith, and his seat as security for his obligations and indebtedness incurred in said board, to the members thereof; that he became delinquent in said board by failure to fulfil his contracts therein, made with divers members thereof, on the twenty-fourth day of August, in the year 1872.

That on the same day, and for the purpose of securing to his said creditors in said board all benefit and advantage which the security of said seat offered them under said constitution and by-laws, and his agreement theretofore made, on October 21st, 1871, he on said day executed and delivered to the defendants a certain instrument in writing in the words and figures following:

"SAN FRANCO., *Augt.* 24, '72.

"I hereby assign my seat in the San Francisco Stock and Exchange Board to Mess. Woods & Freeborn, and hereby authorize them to sell the same to the best advantage, and apply the proceeds of sale to the payment of all debts due from me to the members of said board.

"T. W. FENN.

"Witness:
"J. W. FREBOR."

18 That thereafter one W. B. Thornburgh applied for admission to said San Francisco Stock and Exchange Board, and was duly elected thereto as a member; and these defendants then and there, to wit, on the sixteenth day of September, 1873, by permission of said San Francisco Stock and Exchange Board, transferred the said membership or seat to said Thornburgh, and received from him therefor the sum of ten thousand dollars, gold coin of the United States.

That thereafter, and prior to the commencement of the proceedings in bankruptcy set forth in said complaint, the defendants paid over said ten thousand dollars to the creditors of said Thomas W. Fenn in said San Francisco Stock and Exchange Board, dividing the same rateably between them; and there was not, at the time of the commencement of said bankruptcy proceedings, or at any other time, any property, funds, or moneys in their hands of said bankrupt of any name, nature, or description; and they allege that the transaction hereinabove set forth

was not in violation of any law or statute of the United States referred to in said complaint.

Wherefore they demand that said complaint may be dismissed, that they may have judgment against the said Henry C. Hyde, plaintiff herein, for their costs.

WM. H. L. BARNES,
Defendants' Attorney.

UNITED STATES OF AMERICA,
District of California, ss:

19 F. H. Woods, of Woods and Freeborn, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has heard read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to these matters he believes it to be true.

F. H. WOODS.

Subscribed and sworn to before me this 22d day of November, A. D. 1873.

[SEAL.] CHAS. A. LOW,
U. S. Commissioner.

(Endorsed:) Filed 29th Nov., 1873. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

Service of copy of the within answer admitted this day of Novr., 1871.

GEO. B. MERRILL,
Plff.'s Atty.

20 *Findings.*

In the circuit court of the United States, of the ninth judicial circuit, district of California.

HENRY C. HYDE, ASSIGNEE OF T. W. FENN, a bankrupt, plaintiff,
vs.
FRANK H. WOODS AND JAMES FREEBORN, defendants.
} Findings.

A jury having been waived by a stipulation of the parties in writing duly filed, this cause came on to be tried by the court without a jury on the ninth day of April, A. D. 1874, and after hearing the testimony and the arguments of counsel, the court, being sufficiently advised, now finds the following facts and conclusions of law, viz:

FIRST.

The petition in bankruptcy against Fenn was filed by a creditor September 20, 1872, and he was adjudged a bankrupt thereon October 1, 1872. Thereafter, to wit, on the 1st day of November, 1872, Henry C. Hyde was appointed assignee of said bankrupt.

SECOND.

In 1862, "The San Francisco Stock and Exchange Board" was organized, and a constitution and by-laws adopted for the government
21 of all who should become members. Under said constitution and

by-laws, the number of members was limited, and no person could be admitted except upon an election by ballot upon a proposal, made at least five days preceding the election; and five negative votes excluded the applicant. Every party so elected subscribed to the constitution and by-laws, and agreed to be bound by their provisions. Under said constitution there was at no time any ownership or property in the privilege of membership in said board, or right to do business therein as a member, except as provided in and limited by said articles, constitution, and by-laws, and the privileges granted to any one becoming a member were not assignable, descendible, or transferable except as provided in said constitution and by-laws.

Article IX of said constitution provides as follows: "Any member who fails or has failed to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors; that on his application for re-admission, a committee of three members shall be appointed by the president to investigate his conduct and the cause of his failure. The applicant shall then be admitted to his seat in the board upon the assent of two-thirds of the members there present."

Article XIV provided as follows, to wit: "In case of retirement of any member in good standing from this board, he shall have the right to sell his seat to the best advantage, and to nominate his assignee
22 to fill the vacancy; provided that said nominee shall thereby acquire no right or privilege until proposed and elected in the manner and form prescribed by the constitution of this board, it being distinctly understood that this board reserves to itself the right to reject any or all nominees at its pleasure. Any member assigning his seat shall be entitled to the initiation-fee at the time, in case his nominee shall be elected by the board. In case of the death of a member, this board pledges itself to dispose of the vacant seat to the best advantage for the benefit of the widow and children of the deceased; and in case there be neither widow nor childen, then for the benefit of such parties as the deceased may indicate in his last will and testament. In case of the suspension of any member by failure to fulfil his contracts, or by insolvency, the board will exercise a generous discretion, guided by the circumstances of each case, in disposing of the seat for the benefit of the party suspended; provided that a party who accepts the proceeds of the sale of his seat under this resolution shall not be re-admitted, except in the manner and form prescribed by the constitution and by-laws for the admission of new members. All members of this board who may have been suspended for six months and upwards, and who have not made a satisfactory settlement of their contracts during that time, shall be deprived of all privileges of membership of this board, and their seats become the property of their credi-
23 tors in the board."

Article XV provived as follows: "In sales of seats for account of delinquent members, the proceeds shall be applied to the benefit of the members of this board, exclusive of outside creditors, unless there shall be a balance after payment of the claims of members in full."

THIRD.

Thomas W. Fenn became a member of said board October 21, 1871, subject to said articles, and thereby his privilege of doing business therein and his seat became security to said board and the members thereof for his obligations and indebtedness incurred in said board to the members thereof. On the twenty-fourth of August, 1872, he became

delinquent in said board by failure to fulfil his contracts therein made with divers members thereof. On the same day, and for the purpose of securing to his said creditors in said board all benefit and advantage which the security of said seat afforded them under said constitution and by-laws, and his agreement theretofore made, on October 21, 1871, he on said day executed and delivered to the defendants a certain instrument in writing, in the words and figures following:

"SAN FRANCISCO, *August* 24, 1872.

"I hereby assign my seat in the San Francisco Stock and
24 Exchange Board to Messrs. Woods and Freeborn, and hereby authorize them to sell the same to the best advantage, and apply the proceeds of sale to the payment of all debts due from me to the members of said board.

"T. W. FENN.

"Witness:
"J. W. FREEBORN."

FOURTH.

Thereafter, one W. B. Thornburgh applied for admission to said San Francisco Stock and Exchange Board, and was duly elected thereto as a member, and the defendants then and there, to wit, on the sixteenth of September, 1873, by permission of said San Francisco Stock and Exchange Board, transferred the said membership or seat to said Thornburgh, and received from him therefor the sum of ten thousand dollars, gold coin of the United States.

FIFTH.

At the time of the execution of said instrument, the admission of said Thornburgh, and receipt of said money, said Fenn was insolvent, and said defendants then had reasonable cause to believe him to be insolvent, and at said times the said defendants were members of said stock-board, and said Fenn as a member of said board was indebted to said defendants as such members upon transactions had in said board
25 within the intent and meaning of said provisions of the constitution and by-laws hereinbefore set out, for which the seat and privileges of said Fenn as such member were security in the sum of more than $2,973.30, and said Fenn was at said time in like manner indebted to divers other members of said board, arising upon like transactions, and for which his said seat and privileges were in like manner security, in amounts exceeding the sum of ten thousand dollars in gold coin.

SIXTH.

Upon the receipt of said sum of ten thousand dollars as aforesaid, and prior to the commencement of the proceedings in bankruptcy set forth in the complaint herein, the defendants applied to the payment, and paid over to the several creditors of said Fenn in and as members of said stock-board, upon the said several amounts of indebtedness, the whole of said sum of ten thousand dollars so received, dividing the same proratably between said several creditors; the sum received and retained by said defendants and applied to the satisfaction of a portion of the said indebtedness to themselves being upon said pro-rata division the sum of $2,973.30, and no more, the remainder of said sum of $10,000 having been paid on the said claims of said other creditors in said stock and exchange board.

SEVENTH.

At the time of the commencement of said proceedings in bank-
26 ruptcy the said funds had all been paid over and applied as aforesaid. There were not at that time any funds of said Fenn in the hands of said defendants, nor had there been any funds of his in their hands at any time other than as aforesaid.

And as conclusion of law, the court finds that there is no cause of action, and defendants are entitled to judgment.

Let judgment be entered for defendants with costs.

(Sgd.) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Circuit.

(Endorsed:) Filed June 8th, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

27 *Judgment.*

In the circuit court of the United States, of the ninth judicial circuit, in and for the district of California.

HENRY C. HYDE, ASSIGNEE OF T. W. FENN, a bankrupt, plaintiff, *vs.* FRANK H. WOODS AND JAMES FREEBORN, defendants. } No. 1191.

This cause having come on regularly for trial on the 9th day of April, A. D. 1874, being a day in the February term, A. D. 1874, of said court, before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties duly filed with the clerk of said court, George B. Merrill, esq., appearing on behalf of plaintiff, and W. H. L. Barnes, esq., on behalf of defendants; and the evidence on behalf of the respective parties having been introduced and closed; and the cause, after arguments of counsel, having been submitted to the court for consideration and decision; and the court, after due deliberation, having filed its finding in writing, and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and the finding aforesaid,
28 it is considered by the court that the plaintiff take nothing by this action; that the defendants go hereof without day; and that said defendants do have and recover of and from said plaintiff their costs in this behalf expended, taxed at fifty-one $\frac{00}{100}$ dollars.

Judgment entered the 8th day of June, A. D. 1874.

L. S. B. SAWYER, *Clerk.*

A true copy of an original entered in the therein-entitled cause in judgment-register C. L., No. 2, p. 42.

Attest, &c.,

L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed 8th June, 1874. L. S. B. Sawyer, clerk.

29 *Certificate to judgment-roll.*

United States of America, circuit court of the United States, ninth judicial circuit, district of California.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing papers attached together constitute the judgment-roll in the cause therein entitled.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at San Francisco, this 8th day of June, A. D. 1874.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

(Endorsed:) Judgment-roll. Filed June 8th, A. D. 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

30 *Opinion.*

In the circuit court of the United States, of the ninth judicial circuit, district of California.

HENRY C. HYDE, ASSIGNEE OF T. W. FENN, A bankrupt,
v.
F. H. WOODS ET AL.

1. STOCK BROKERS—PROPERTY IN MEMBERSHIP.—Where under the articles of association of a board of stock-brokers, a member cannot transfer his seat to a party not elected and approved by the board; and where, upon the insolvency of a member, his rights as such are forfeited, and the board is authorized to dispose of his seat and apply the proceeds to the payment of his indebtedness to other members of the board to the exclusion of all others, only the residue of the proceeds of the sale, after paying all the liabilities provided for in said articles of association, is assets of such insolvent member.

2. SAME.—Under such articles, F., a member, failed to meet his engagements in the board August 24, 1872, and being indebted in a large amount to sundry members, on that day assigned his seat in the
31 board to W., with authority to sell and pay the proceeds to his various creditors in the board. With the assent of the board, W. sold the seat to T., who was selected by the board, for ten thousand dollars, and, with the approval of the board, paid the entire proceeds proratably to F.'s creditors who were co-members. October 1, 1872, F. was adjudged a bankrupt on petition of a general creditor filed September 18, 1872. After said sale and payment, an assignee having been appointed, he brought suit against W. to recover said sum of ten thousand dollars.

Held, that the assignee was only entitled to the residue after payment of F.'s liabilities to the co-members, provided for in the articles of association, and there being no surplus he was not entitled to recover.

SAWYER, circuit judge:

This is an action by the assignee in bankruptcy of Thomas W. Fenn to recover the proceeds of the sale of the seat of Fenn in "The San Francisco Stock and Exchange Board," which were received by defendants within four months before the filing of the petition in bankruptcy

The petition in bankruptcy against Fenn was filed by a creditor September 20, 1872, and he was adjudged a bankrupt thereon October 1, 1872. The facts are as follows:

In 1862, "The San Francisco Stock and Exchange Board" was organized, and a constitution and by-laws adopted for the government of all who should become members. Under said constitution and by-laws,
32 the number of members was limited, and no person could be admitted, except upon an election by ballot upon a proposal made at least five days preceding the election; and five negative votes excluded the applicant. Every party so elected subscribed to the constitution and by-laws, and agreed to be bound by their provisions. There was at no time any ownership or property in the privilege of membership in said board, or right to do business therein as a member, except as provided in and limited by said articles, constitution, and by-laws; and the privileges granted to any one becoming a member were not assignable, descendible, or transferable except as provided in said constitution and by-laws.

Article IX of said constitution provided as follows: "Any member who fails or has failed to comply with his contracts, or becomes insolvent, shall be suspended until he has settled with his creditors; that on his application for re-admission, a committee of three members shall be appointed by the president to investigate his conduct and the cause of his failure. The applicant shall then be admitted to his seat in the board upon the assent of two-thirds of the members there present."

Article XIV provided as follows, to wit: "In case of retirement of any member in good standing from this board, he shall have the right to sell his seat to the best advantage, and to nominate his assignee to fill the vacancy; provided that said nominee shall thereby acquire no right or privilege until proposed and elected in the manner and form
33 prescribed by the constitution of this board, it being distinctly understood that this board reserves to itself the right to reject any or all nominees at its pleasure. Any member assigning his seat shall be entitled to the initiation-fee at the time, in case his nominee shall be elected by the board. In case of the death of a member, this board pledges itself to dispose of the vacant seat to the best advantage for the benefit of the widow and children of the deceased; and in case there be neither widow nor children, then for the benefit of such parties as the deceased may indicate in his last will and testament. In case of the suspension of any member by failure to fulfil his contracts, or by insolvency, the board will exercise a generous discretion, guided by the circumstances of each case, in disposing of the seat for the benefit of the party suspended; provided that a party who accepts the proceeds of the sale of his seat under this restriction shall not be re-admitted except in the manner and form prescribed by the constitution and by-laws for the admission of new members. All members of this board who may have been suspended for six months and upwards, and who have not made a satisfactory settlement of their contracts during that time, shall be deprived of all privileges of membership of this board, and their seats become the property of their creditors in the board."

Article XV provided as follows: "In sales of seats for ac-
34 count of delinquent members, the proceeds shall be applied to the benefit of the members of the board, exclusive of outside creditors, unless there shall be a balance after payment of the claims of members in full."

Thomas W. Fenn became a member of said board October 21, 1871, subject to said articles, and thereby his privilege of doing business therein and his seat became security to said board, and the members

thereof, for his obligations and indebtedness incurred in said board to the members thereof. On the twenty-fourth of August, 1872, he became delinquent in said board by failure to fulfil his contracts therein made with divers members thereof. On the same day, and for the purpose of securing to his said creditors in said board all benefit and advantage which the security of said seat afforded them under said constitution and by-laws, and his agreement theretofore made, on October 21st, 1871, he on said day executed and delivered to the defendants a certain instrument in writing, in the words and figures following:

"SAN FRANCISCO, *August* 24, 1872.

"I hereby assign my seat in the San Francisco Stock and Exchange Board to Messrs. Woods and Freeborn, and hereby authorize them to sell the same to the best advantage, and apply the proceeds of sale to the payment of all debts due from me to the members of said board.

"T. W. FENN.

"Witness: J. W. FREEBORN."

35 Thereafter, one W. B. Thornburgh applied for admission to said San Francisco Stock and Exchange Board, and was duly elected thereto as a member, and the defendants then and there, to wit, on the sixteenth of September, 1873, by permission of said San Francisco Stock and Exchange Board, transferred the said membership, or seat, to said Thornburgh, and received from him therefor the sum of ten thousand dollars, gold coin of the United States.

At the time of the execution of said instrument, the admission of said Thornburgh, and receipt of said money, said Fenn was insolvent, and said defendants then had reasonable cause to believe him to be insolvent, and at said times the said defendants were members of said stock-board, and said Fenn, as a member of said board, was indebted to said defendants as such members upon transactions had in said board within the intent and meaning of said provisions of the constitution and by-laws hereinbefore set out, for which the seat and privileges of said Fenn as such member were security, in the sum of more than $2,973.30, and said Fenn was at said time in like manner indebted to divers other members of said board, arising upon like transactions, and for which his said seat and privileges were in like manner security, in amounts exceeding the sum of ten thousand dollars in gold coin. Upon the receipt of said sum of ten thousand dollars as aforesaid, and prior to the commencement of the proceedings in bankruptcy set forth in
36 the complaint herein, the defendants applied to the payment, and paid over to the several creditors of said Fenn, in and as members of said stock-board, upon the said several amounts of indebtedness, the whole of said sum of ten thousand dollars so received, dividing the same proratably between said several creditors; the sum received and retained by said defendants, and applied to the satisfaction of a portion of the said indebtedness to themselves, being upon said pro-rata division the sum of $2,973.30 and no more, the remainder of said sum of $10,000 having been paid on the said claims of said other creditors in said stock and exchange board. At the time of the commencement of said proceedings in bankruptcy, the said funds had all been paid over and applied as aforesaid. There were not at that time any funds of said Fenn in the hands of said defendants, nor had there been any funds of his in their hands at any time other than as aforesaid.

The San Francisco Stock and Exchange Board is a voluntary association. The members had a right to associate themselves upon such terms

as they saw fit to prescribe, so long as there was nothing immoral, or contrary to public policy, or in contravention of the law of the land, in the terms and conditions adopted. No man was under any obligation to become a member unless he saw fit to do so; and when he did, and subscribed the constitution and by-laws, thereby accepting and assenting to the conditions prescribed, he acquired just such rights, with
37 such limitations, and no others, as the articles of association provided for. I find nothing in the articles, constitution, and by-laws of this association in contravention of the law of the land. The rights acquired by a party entering the association with the assent of the other members are clearly prescribed in these articles. Under their provisions there is in a member no absolute unlimited right of disposition of his seat or the privileges of membership. Each member holds his seat, and exercises the privileges conferred, subject to certain prescribed rights of the association and of the other members in his seat in case he fails to perform his duty toward the association or to his fellow-members; and the rights accorded to the association or his fellow-members by the terms upon which a member is admitted cannot be abrogated or limited by any subsequent act of his. A member cannot dispose of his right of membership to another unless the association shall accept that other in his stead in the mode and upon the terms prescribed. If he fails to meet his liabilities to his fellow-members incurred in the course of the proper business transactions of the board, he is suspended; and if his obligations are not met, and he is not restored within the time prescribed, his rights and privileges as a member become the property of the association, and are disposed of for the benefit of his creditors in the board to the exclusion of all others. He cannot himself, by any act of disposition of his own, prevent this result. His general creditors can obtain through him no greater
38 rights of property than he himself possesses. His privileges as a member of the stock-board could not be seized and sold on execution, and transferred to another in violation of the rights secured by the contract of association, nor could a court of bankruptcy override the rights of the association or its members, secured to them by the terms of the contract under which he acquires any rights at all as a member, by disposing of a greater interest than he himself possesses. The only property of a pecuniary nature in Fenn, after his default in the board, would be the residue left after disposing of his seat by the board in accordance with its prescribed usages, or with the assent of the board and payment of his indebtedness to the members of the board incurred in the transaction of its business. This is all that under any circumstances would be available to the general creditor, or with which the court of bankruptcy has any concern. The rest is the property of the board and its members, not Fenn's. In this case there was a delinquency of Fenn in his transactions in the board. He was indebted in large sums to the members upon transactions occurring in the board, for which his seat and privileges as a member were first liable under the rules of the association. It is true that he did not insist upon waiting six months, under the rules, as he might have done, before his seat became absolutely forfeited. He merely waived this right and allowed his seat to be disposed of at once, and applied to the purposes provided for in the articles of association. His assignment to defendants
39 only enabled them to close up without delay his connection with the board and distribute the avails to the proper parties instead of waiting six months. There is no claim set up that the privileges of Fenn did not sell for all they were worth; and the money realized did

not satisfy the just claims of the other members. Nor is there any claim that this proceeding was in fact more disadvantageous to creditors than if the proceedings had taken a different course. There was nothing left, which, under any circumstances, could be available to the general creditors. Fenn transferred nothing to defendants that a court of bankruptcy could take hold of. There was no residuum. His estate being subordinate to the claims of his associates under the articles of association, and consisting only of such residuum, there was nothing of it of value. Defendants only received and distributed to the proper parties that part of the proceeds of Fenn's seat which belonged to the other members, as they had a right to do under the articles of association. The error of the plaintiff consists in regarding the seat of Fenn and its proceeds as wholly his property, subject to his absolute disposition, whereas he only had a qualified and limited property in it, an interest subordinate to that of his associates. His estate is what is left after other paramount claims are satisfied out of it, and there appears to be nothing left. The prior rights of his co-members accrued by virtue of the very act by which Fenn acquired any rights at all as a member of the board, and they cannot be divested. The articles of association do not authorize Fenn or anybody else to dispose of Fenn's property contrary to the provisions of the bankrupt act, as claimed by the plaintiff. They only determine what the extent of his rights of property under the articles of association are, and authorize the board to administer its own affairs, and protect the rights of its own members, in matters pertaining to the transactions of the board, in its own way.

There must be judgment for the defendants, with costs.

JUNE 8, 1874.

GEO. B. MERRILL, *for plaintiff.*

BARNES, *for defendants.*

(Endorsed:) Read in open court June 8th, 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

Bond on writ of error.

In the Supreme Court of the United States.

HENRY C. HYDE, ASSIGNEE, &C., PLAINTIFF IN error,
vs.
FRANK H. WOODS AND JAMES FREEBORN, defendants in error.

Know all men by these presents that we, Henry C. Hyde, assignee of T. W. Fenn, a bankrupt, as principal, and Frederic W. Eaton, of the city and county of San Francisco, State of California, and De Witt C. Thompson, of the city and county of San Francisco, State of California, as sureties, are held and firmly bound unto Frank H. Woods and James Freeborn above named, in the sum of five hundred dollars, to be paid to the said Frank H. Woods and James Freeborn, their executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly, by these presents, sealed with our seals, dated this thirtieth day of September, A. D. 1874.

Whereas the above-named Henry C. Hyde, assignee of T. W. Fenn,

a bankrupt, has prosecuted a writ of error to the Supreme Court of the United States of America, to reverse the judgment rendered in
42 the above-entitled action by the circuit court of the United States for the district of California:

Now, therefore, the condition of this obligation is such, that if the above-named Henry C. Hyde, assignee of T. W. Fenn, a bankrupt, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HENRY C. HYDE. [SEAL.]
As Assignee of T. W. Fenn, bkt.
FREDERIC W. EATON. [SEAL.]
D. W. C. THOMPSON. [SEAL.]

Signed, sealed, and delivered in presence of—
JOS. F. O'BEIRNE.

UNITED STATES OF AMERICA,
District of California, ss:

Frederic W. Eaton and De Witt C. Thompson, being duly sworn, each for himself deposes and says that he is a freeholder in said district, and is worth the sum of five hundred dollars exclusive of property exempt from execution, and over and above all debts and liabilities.

FREDERIC W. EATON.
D. W. C. THOMPSON.

Subscribed and sworn to before me this 30th day of September, A. D. 1874.

JOS. F. O'BEIRNE,
U. S. Commissioner, Dist. of Cala.

(Endorsed:)
I approve both the form of the within bond and the sufficiency of the sureties thereon.

LORENZO SAWYER,
U. S. Circuit Judge.

43 Filed 30 Septr., 1874.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

44 UNITED STATES OF AMERICA,
District of California:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing forty-three written pages, numbered from 1 to 43, both inclusive, are a true copy of the record and of all proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this seventh day of October, A. D. 1874.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

(Indorsement on cover:) No. 230. Henry C. Hyde, as assignee of T. W. Fenn, a bankrupt, plaintiff in error, *vs.* Frank H. Woods & James Freeborn. California C. C. U. S. Filed 7th November, 1874.

U. S. Supreme Court.

October Term. No. 230.

HENRY C. HYDE,

Assignee of T. W. FENN, a Bankrupt,

Plaintiff in Error.

vs.

FRANK H. WOODS,

AND

JAMES FREEBORN.

Brief for Plaintiff in Error.

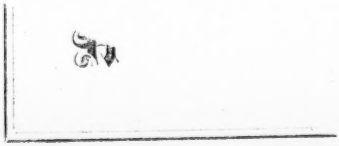
GEORGE B. MERRILL,

Attorney for Plaintiff.

EDWARD B. MERRILL,

Of Counsel.

NEW YORK:
REYNOLDS & WHELPLEY, PRINTERS, 23 PARK ROW.



Supreme Court

OF THE UNITED STATES.

HENRY C. HYDE, Assignee of THOMAS W. FENN, a Bankrupt, *Plaintiff in Error,* *vs.* FRANK H. WOODS AND JAMES FREEBORN, *Defendants in Error.*	October Term, 1876. No. 230.

Brief For Appellant:

Statement of Fact.

This is an appeal from a judgment entered in an action brought in the Circuit Court of the United States for the District of California, by the Assignee in Bankruptcy of Thomas W. Fenn, to recover the proceeds of the seat of Fenn in the "San Francisco Stock and Exchange Board," which were received by defendants within four months before the filing of the petition in bankruptcy.

The petition in Bankruptcy against Fenn was filed by a creditor, September 20, 1872, and he was adjudged a bankrupt thereon, October 1, 1872. Thereafter, to wit, on the 1st day of November, 1872, Henry C. Hyde was appointed Assignee of said Bankrupt.

In 1862, "The San Francisco Stock and Exchange Board" was organized, and a Constitution and By-Laws adopted, for the government of all who should become members. Under said Constitution and By-Laws, the number of members was limited, and no person could be admitted, except upon an election by ballot, upon a proposal made at least five days preceding the election; and five negative votes excluded the applicant. Every party so elected subscribed to the Constitution and By-Laws, and agreed to be bound by their provisions under said Constitution. There was at no time any ownership or property in the privilege of membership in said Board, or right to do business therein as a member, except as provided in and limited by said Articles, Constitution and By-Laws, and the privileges granted to any one becoming a member were not assignable, descendible or transferable, except as provided in said Constitution and By-Laws.

Article IX. of said Constitution provided as follows:

"Any member who fails or has failed to comply with his contracts, or becomes insolvent shall be suspended, until he has settled with his creditors. That, on his application for re-admission, a committee of three members shall be appointed by the President to investigate his conduct and the cause of his failure. The applicant shall then be admitted to his seat in the Board, upon the assent of two-thirds of the members there present."

Article XIV. provided as follows, to wit.:

"In case of retirement of any member, in good standing, from this Board, he shall have the right to sell his seat, to the best advantage, and to nominate his assignee to fill the vacancy. Provided, that said nominee shall thereby acquire no right or privilege until proposed and elected, in the manner and form prescribed by the Constitution of this Board, it being distinctly understood, that this Board reserves to itself the right to reject any or all nominees at its pleasure. Any member assigning his seat shall be entitled to the initiation fee at the time, in case his nominee shall be elected by the Board. In

case of the death of a member, this Board pledges itself to dispose of the vacant seat to the best advantage, for the benefit of the widow and children of the deceased; and, in case there be neither widow nor children, then for the benefit of such parties as the deceased may indicate in his last will and testament. In case of the suspension of any member, by failure to fulfill his contracts, or by insolvency, the Board will exercise a generous discretion, guided by the circumstances of each case in disposing of the seat for the benefit of the party suspended; Provided, that a party who accepts the proceeds of the sale of his seat, under this resolution, shall not be re-admitted, except in the manner and form prescribed by the Constitution and By-Laws for the admission of new members. All members of this Board who may have been suspended for six months and upwards, and who have not made a satisfactory settlement of their contracts during that time, shall be deprived of all privileges of membership of this Board; and their seats become the property of their creditors in the Board."

Article XV. provided as follows:

"In sales of seats for account of delinquent members, the proceeds shall be applied to the benefit of the members of this Board, exclusive of outside creditors, unless there shall be a balance, after payment of the claims of members in full."

Thomas W. Fenn became a member of said Board October 21, 1871, subject to said articles, and thereby his privilege of doing business therein and his seat became security to said Board and the members thereof for his obligations and indebtedness incurred in said Board to the members thereof. On the twenty-fourth of August, 1872, he became delinquent in said Board by failure to fulfill his contracts therein, made with divers members thereof. On the same day, and for the purpose of securing to his said creditors in said Board all benefit and advantage which the security of said seat afforded them under said Constitution and By-Laws, and his agreement theretofore made on October 21,

1871, he on said day executed and delivered to the defendants a certain instrument in writing; in the words and figures following:

SAN FRANCISCO. August 24, 1872.

I hereby assign my seat in the San Francisco Stock and Exchange Board to Messrs Woods and Freeborn, and hereby authorize them to sell the same to the best advantage, and apply the proceeds of sale to the payment of all debts due from me to the members of said Board.

T. W. FENN.

WITNESS,
J. W. FREEBORN.

Thereafter, one W. B. Thornburgh, applied for admission to said San Francisco Stock and Exchange Board, and was duly elected thereto as a member, and the defendants then and there, to wit, on the sixteenth of September 1873, by permission of said San Francisco Stock and Exchange Board, transferred the said membership or seat to said Thornburgh, and received from him therefor, the sum of ten thousand dollars gold coin of the United States.

At the time of the execution of said instrument, the admission of said Thornburgh and receipt of said money, said Fenn was insolvent, and said defendants then had reasonable cause to believe him to be insolvent, and at said times the said defendants were members of said Stock Board, and said Fenn, as a member of said Board was indebted to said defendants as such members upon transactions had in said Board within the intent and meaning of said provisions of the constitution and by-laws hereinbefore set out, for which the seat and privileges of said Fenn as such member were security, in the sum of more than $2,973 30-100, and said Fenn was at said time in like manner indebted to divers other members of said Board, arising upon like transactions, and for which his said seat and privileges were in like manner security, in amounts exceeding the sum of ten thousand dollars in gold coin.

Upon the receipt of said sum of ten thousand dollars, as aforesaid, and prior to the commencement of the proceedings in bankruptcy set forth in the complaint herein, the defendants applied to the payment, and paid over to the several creditors of said Fenn in, and as members of, said Stock Board, upon the said several amounts of indebtedness the whole of said sum of ten thousand dollars so received, dividing the same pro-ratably between said several creditors, the sum received and retained by said defendants, and applied to the satisfaction of a portion of the said indebtedness to themselves, being upon said pro-rata division the sum of $2,973.30, and no more, the remainder of said sum of $10,000, having been paid on the said claims of said other creditors in said Stock and Exchange Board.

At the time of the commencement of said proceedings in bankruptcy, the said funds had all been paid over and applied as aforesaid. There were not at that time any funds of said Fenn in the hands of said defendants, nor had there been any funds of his in their hands at any time other than as aforesaid.

FIRST POINT.

The Court below finds that "at the time of the execu-
" tion of the said instrument, the admission of said
" Thornburgh, and the receipt of said money, said Fenn
" was insolvent, and said defendants then had reasonable
" cause to believe him to be insolvent," etc.

Transcript of Record, fol. 35, p. 15.

The petition in bankruptcy against Fenn was filed by a creditor, September 20, 1872, and he was adjudged a bankrupt thereon, October 1, 1872.

There is no dispute but that the sum in suit was received by the defendants and paid out by them as assignee or agents of and for the benefit of the bankrupt, within four months of the adjudication in bankruptcy.

Such a disposition of these funds, the private and separate property of the bankrupt, so paid and disposed of, operated as a preference of certain separate creditors of the bankrupt, and was a manifest fraud upon the provisions of the Bankrupt Act.

Bankrupt Act, § § 14–35.
Toof vs. Martin, 13 Wall, 40.

SECOND POINT.

But if the Court holds that we must consider the source from whence the bankrupt or his agents derived this sum of ten thousand dollars, an examination of the relative situation of the parties at the period of time in question is proper. The Court below says, that it finds "nothing in the articles, constitution and by-laws of "this association in contravention of the law of the "land."

The adjudication was made October 1, 1872.

The answer admits—

1. An assignment by the bankrupt to defendants of a seat in the Board of Brokers, August 24, 1872, for the purpose of sale.

2. A transfer by defendants of said seat to W. B. Thornburgh.

3. The receipt by defendants of $10,000 gold therefor.

Defendants justify their refusal to pay the money so received to plaintiff by alleging—

1. That Fenn, the bankrupt, was a member of the Stock Board, a private association, acting under a Constitution.

2. That under it the number of members was limited, and no one could be admitted but by ballot of the members.

3. Upon election each person was bound by the Constitution.

4. There was no *ownership* or *property* in the *privileges* of members, *except* as provided and limited therein.

5. That the *privileges* of members were not assignable except under the Constitution.

6. That by Article IX, any member who becomes insolvent, shall be suspended.

7. That by Article XIV, a member retiring in good standing, shall have the right to *sell* his seat, and nominate his assignee to fill the vacancy, which assignee shall have no privilege until proposed and elected.

8. That any member assigning his seat, shall be entitled to the initiation fee, in case his nominee shall be elected by the Board ; and if a member dies, the Board will *dispose of his seat* for his heirs (specially named), or legatees.

9. That if a member is suspended, the Board will exercise a "generous discretion" in *disposing* of the *seat* for the *benefit* of the *party* suspended; provided, that a party who accepts the proceeds of the sale of his seat under this resolution, shall not be re-admitted except as a new member under the Constitution.

The phrase "generous discretion," is interpreted by the Court below as, "his rights and privileges as a member becomes the property of the Association, and are disposed of for the benefit of his creditors in the Board, to the exclusion of all others;" in other words, his associates confiscate the property to their own use.
Transcript of Record, fol. 37, p. 16.

10. That all members who have been suspended for six months without having made a satisfactory settlement of their contracts, shall lose their privileges, and

their seats *become* the *property* of their *creditors in the Board.*

11. That by Article XV in sales of seats for account of delinquent members, the proceeds shall be applied to the benefit of the members of the Board, *exclusive* of *outside* creditors.

And they say—

1. That Fenn became a member October 1, 1871.

2. That he then and there *pledged* to said Board and its members, his privilege of doing business as security for his obligations incurred in the Board.

3. That he became delinquent August 24, 1872.

4. That on that day for the purpose of securing his creditors in said Board under the Constitution and By-laws, and his agreement" aforesaid, he assigned his seat in the Board to the defendants for sale.

In reply, plaintiff says, that the Constitution of the Board of Brokers can afford no means of defense, even if complied with, for that instrument is in direct contravention to the Bankrupt Act.

1. The provisions of the Constitution are the rules of government of an association of *individuals* by which, being described, they mutually *agree to act contrary* to the Bankrupt Act, in this, that they determine the very *existence* of *property* in a member by making—under Art. XIV.—it impossible that his seat shall have value if he is insolvent, *except* the purchaser is acceptable to the other members, and the proceeds are paid to themselves.

2. By Art. XV. they mutually agree, if a member is insolvent, to *make property* of the seat for their own benefit, and from the proceeds of its sale to *prefer* themselves, *exclusive of outside* creditors."

3. They mutually agree, by Art. XV. to allow the member, though insolvent, to *retain his seat* (which, if permitted, as a member in good standing he could sell) for *six months* before he need part with it or it become the property of his creditors in the Board (after which he

agrees to *allow* the Board to take it) but by the 14th section of the Bankrupt Act all the property of the bankrupt becomes at once the property of his creditors.

4. Under such a Constitution any member may be *utterly insolvent* in his relations with the world, *outside* the Stock Board, and while in the ownership and possession of property, to wit, a seat worth $10,000, might defy the operation of the Bankrupt Act, or any Act that could be framed by State or National Government, to devote its saleable value to the payment of his just debts.

5. Even when there must follow a sale of the seat on account of the delinquency or insolvency of the member, the action of the Board for the collecting their own debts is subordinate to and must wait upon the action of the bankrupt himself, or rather his inaction for a period of six months, a deliberation and privilege of depriving his creditors of their just claims which contravenes the whole spirit and letter of the Bankrupt Act.

6. If a member of the Board should honestly wish to surrender to *all* of his creditors *all* that his property will bring, and this Constitution operating in favor of an *inside* creditor can prevail, no appeal to the Courts of the United States nor the exercise of their power can help him to meet his obligation to the laws and to his conscience.

7. The Stock Board—as all Stock Boards—is established not simply for doing the private business of members among themselves, but for doing the business of others, unnamed and unknown *outsiders* who are speculators, and to whom the brokers must necessarily become indebted, *and* who speculate successfully only through such an institution, and sits as a quasi private tribunal over the delinquencies and failures of its members, *compelling* them to make *preferred* creditors of their fellow-members, on *penalty* of losing all opportunity of following their business.

8. It—the Constitution—is an assumption by the members of this voluntary, unincorporated association of legislative powers by which they enact a new law for the exemption of additional property from execution in addition to that provided by the laws of the State.

9. If brokers can make such an agreement among themselves to disregard and act directy in opposition to the laws of the United States and by assuming judicial power set up such a private tribunal, and decree what is or is not property, so also might each and all the co-operative societies and "Independent Orders of Brotherhood" throughout the land, and thus the community of merchants be a collection of leagues dictating law and justice in accordance with the terms which seems best for their own interests. Such a position is contrary to law, and can in no event be binding upon third parties.

In Austin *vs.* Searing 16, N. Y., 112, which was an action brought by the plaintiff, for himself and others, claiming title to certain personal property, under an adjudication of a body, existing in an association of persons calling themselves Odd Fellows, known as the Grand Lodge, by whose adjudications in all matters relating to the affairs, discipline and property of the association, it is assumed that the plaintiff and defendants had, by an executory contract, agreed to be bound, both parties being members of such association, which is voluntary and unincorporated, and, having contributed to the funds in controversy, under that agreement, it was held, that the Courts will not enforce such a contract, nor lend their aid to give effect to the decrees of a tribunal thus constituted. And the Court say further,

"An agreement by which the members of an association undertake to confer judicial powers, in respect to the property in which they have a common interest, upon a body of men or officers, to be from time to time selected out of the association at large, as a tribunal having general authority to adjudicate upon alleged violations of the rules of the association, and to decree a forfeiture of the rights to such property of the parties adjudged to have been guilty of such violation, is void.

The Courts will not aid in enforcing the judgment of a tribunal sought to be created by private compact, except in cases of a submission to arbitration of specific matters of controversy.

"The Civil Courts will not take notice of or give effect to the Constitution or laws of a voluntary, unincorporated association, nor regard a member thereof as coming under any obligation or disability, growing out of such Constitution or laws, not proved to have been assumed by him in such a manner as would establish a valid contract between individuals not members of the association."

And on page 124: "The by-laws and regulations of these voluntary associations may all be very well in their place and sphere, and may command general obedience and submission of those upon whom they are designed to act; they cannot, however, have the force of law, nor impair or affect the rights of property against the will of its real owners. So long as the members of these bodies yield their assent or concurrence it is all very well; the law interposes no obstacles or objections. But when orders and decrees of the character of these referred to are resisted, and the owners of property refuse to be deprived of it, then it will be found that property has rights, and the courts of justice have duties, of which the plaintiff in this action seems to have an indifferent conception. The courts of justice cannot be called upon to aid in enforcing the decrees of these self-created judicatories. The confiscation and forfeiture of property is an act of sovereign power; and the aid of this or any other Court will not be rendered to enforce such proceedings, or to recognize legal or supposed legal rights founded upon them."

Allen vs. The Duke of Queensbury.
1 Bro. P. C., 393, 403, 404, etc., 8vo., Edn.
Lloyd vs. Loaring, 6 Vesey, 773.
Ex-parte Harris, 1 De Gex, 162.
Ex-parte, Orford. In re, Rufford, 21 Law J.
Rep. (N. S.) Bank, 31.

Nor do we apprehend that an attempt will be made to maintain the theory that the proceedings in the courts of justice, or the principles of commercial law, are invariably regulated and controlled by the "Constitution and By-Laws," so called, of the "Stock Exchange," or by that of any other private association, even in matters wherein some members of such association are parties.

Hall vs. Connell, 3 You. and Coll., 707.
Duncan and Another vs. Hill, 6 Eng. Rep., 303.
Moaks' Notes, p. 309.
Wharton on "Stock Brokerages," 2 Southern Law Rev. (N. S.) 32, 1 p.

THIRD POINT.

"The San Francisco Stock and Exchange Board" is a voluntary unincorporated association, and, as to third parties, is governed by the same rules as an ordinary partnership. And the liability of a member thereof in all matters appertaining to his separate creditors will be determined in the same manner as that of an ordinary partner. The apparent faith in the efficacy of their "constitution and by-laws" is but "an affectation of corporate capacity" received from the Legislature.

Weald of Kent Canal Co. vs. Robinson, 5 Taunt., 801.
Kidwelly Canal Co. vs. Roby, 2 Price, 93.
Lloyd vs. Loaring, 6 Vesey, 773.
Cousins vs. Smith, 13 Vesey, 541.

In this case a combination of wholesale grocers, under the title of "A Fruit Club," organized to control the fruit trade of London, were held to be partners.

Beaumont vs. Meredith, 3 Ves. and B., 180.

Where a society for relief in sickness, etc., by means of a fund raised by subscription of the members is considered merely as a partnership, having no corporate character.

Silver et al. vs. Barnes, 6 Bing. (N. C.), 180.

Where members of a benefit society for loaning moneys are held as a partnership.

In Williams vs. Bank of Michigan, 7 Wend., 539.

On page 542 Chancellor Walworth says:

"There are and have been many joint stock, and even banking companies which are mere partnerships, as to every person except their own stockholders, they never having been legally incorporated. Whatever name such a company may assume and use in the transaction of its business, it is a partnership and not a corporate designation."

Wells vs. Gates, 18 Barb., 554.

At page 557: "Companies or societies which are not sanctioned expressly by the Legislature, pursuant to some general or special law, are nothing more than ordinary partnerships, and the laws respecting them are the same."

In the matter of the account of Fry, Treasurer, etc., 4 Phila. R., 129, it is held: "That the members of a joint stock company unincorporated are partners to the world."

Dennis vs. Kennedy, 19 Barb., 517.
Koehler vs. Brown, 2 Daly (N. Y.), 78.
Babb vs. Reed et al., Trustees, 5 Rawle, 151.
Sullivan vs. Campbell, 2 Hall (N. Y.), 271.
Pipe et al. vs. Bateman et al., 1 Iowa, 369.
Parsons on Partnership, 2d Ed., p. 560; note (b), and cases cited.

FOURTH POINT.

It must be borne in mind that the question at issue is one arising between a single individual member of the association and his assignee in bankruptcy, in which there is no claim of a joint indebtedness with his associates or with the "Stock Board," as an entire organization, nor to the "Stock Board" on his own part. In this regard, his relations to his associates in the Board are the same in law, as to his separate creditors outside of the

Board, and must be governed by the same principles as control the legal interests of any two or more private individuals. There cannot be found any such especial magic in the election to the membership of a "Stock Board," nor to the act of signing the "Constitution and By-Laws," and paying an initiation fee to that, or any other Commercial Exchange, which will transform the legal position of the member from his ordinary obligations to his separate creditors, nor lift him above the reach of the influence of the laws of the land. The "Constitution and By-Laws" of such associations are but the "contracts" or "agreements" which bind the associates together, and govern them in their intercourse with one another. Any conditions which they may choose to adopt, are valid as to the business intercourse of each member in and about the especial business for which the Association was formed, and so long and so far as those conditions do not conflict with the laws of the State, or with the United States. Beyond that, if questioned, they have no controlling influence.

Heath vs. President of Gold Exchange, 7 Abb. Pr. (N. S.) 25.

And authorities cited in brief of Counsel for the motion.

White vs. Brownell, 4 Abb., Pr, (N. S.,) 193.
Barker vs. Roberts, 7 Jur., (N. S.) pt. 1, 1185.
Innes vs. Wylie, 1 Carr, & K., 262.
Hopkinson vs. Marquis of Exeter, L. R., 5.

Eq. Cas. 63, in which it is held "that 'Clubs' are "quasi-partnerships, and are to be governed by the "rules of law which control partnerships."

Leach vs. Harris, 2 Brews, (Pa.) 571
Court of Common Pleas, Equity.

This was a complaint to the Philadelphia Board of Brokers against the plaintiff, alleging that the

plaintiff sold to the complainant an interest in a tract of oil land, and in several leases of oil wells, for sums greatly in excess of their value, which he claims to recover, and that he has required the said Board of Brokers to take cognizance of the said complaint, and through the aid of its machinery, to cause the plaintiff to pay the said sums to him, under pain of suspension from the Board. The complainant in the case was a non-resident of the State, a member of the New York Stock Exchange, and not a member of the Philadelphia Board. The Board of Brokers took cognisance of the complaint, and referred the matter to its proper committee. The plaintiff now asks for an injunction restraining perpetually the said Board from further proceding, and it was granted.

The Court held, "that before an expulsion can be "made for an offence *which has no immediate relation* "*to a members corporate duty*, but which is of so infa- "mous a nature as renders him unfit for the society of "honest men, such as the offences of perjury, forgery, "etc., it is necessary that there should be a previous con- "viction by a jury according to the law of the land. "2d, when the offense is against *his duty as a corpora-* "*tor*, and in that case, he may be expelled on trial and "conviction by the corporation. 3d. when the offense "is of a mixed nature against the members duty as a "corporator, and also indictable by the law of the land.

"Boards of Brokers have no jurisdiction over con- "tracts touching houses, lands, leasehold estates, or "farming interests, but only, according to their regula- "tions, over stock contracts."

"Every member of an association is bound by the "laws of the association to which he has assented in be- "coming a member, and by the law of the land as affect- "ing these associations, but not by an exercise of power "on the part of his fellow-members, to which he has "not assented, or which is not derived from the law of "the land."

"The law does not permit these societies to insert in "their charters indefinite powers of expulsion of their

"members, much less do they have such undefined "powers existing among themselves."

And in "The Butchers Beneficial Association," 35 Penn St., (11 Carey), 151, the Court says: "The con- "stitution and By-Laws of such associations must be "consistent with the laws and Constitution of the Uni- "ted States."

Kennebec and Port. R. R. Co. vs Kendall, 31 Maine, 470.

The Seneca County Bank vs. Lamb, 26 Barb., 595.

Lee vs. Wallace, 1 Ld. Keny, 292.

The particular terms of a co-partnership are of no importance to third persons.

Cutter vs. The Estate of Thomas, 25 Vt. 73.

Keasley vs. Codd, 2 C. & P., 408.

Mandslay vs. LeBlanc, 2 C. & P., 409.

If the business for which "Stock Exchanges" are organized is fully examined, it will be found to be such as does not commend itself to any further favors than the most limited interpretation of the law will give it.

"Stock Exchange," vol. 15, Appleton's Cyclopedia, 387 p.

Wharton on "Stock Brokerages," vol. 2, Southern Law Rev., (N. S.) 321 p.

"The Stock Jobbing Act," 7 G, 2, C, 8 repealed, 23 and 24 Vict., ch. 28, 1860.

"The N. Y. Stock Jobbing Act." L. 1858, p. 251, c. 134.

Rex vs. Lord Cochrane, 3 M. and S. 10.

Child vs. Morley, 8 T. R., 610.

Arcardi vs. State, 19 Wall, 635.

Crumps, "The Theory of Stock Exchange Speculation," Longman's, London, 1874, "Introduction," pp. 1-16, chap. vii, p. 92.

The maxim, "*modus et conventio vincunt legem*," is subject to restriction and limitation, and does not apply where the express provisions of any law are violated by

the contract, nor in general where the interests of the public, or of third parties will be injuriously affected by its fulfilment.

Brown's Legal Mag. 5 ed., 695, p.
Kreeble vs. Newcomb et. al., 22 N. Y., 249. 252, p.
Wells vs. the N. Y. Cent. R. R. Co., 24 N. Y. 181, and dissenting opinion on p. 191.

The provisions of an enactment intended for a public purpose, cannot be waived by any private arrangement, even in a question between the parties to that arrangement.

Swan et. al. vs. Blair, 3 Cl. & F., 621.
Phillips vs. Innes, 4 Cl. & F., 241.

FIFTH POINT.

A critical examination of the articles of the "Stock Board" will show that the member holds his seat with right of transfer, bequest or sale to third parties, subject to certain conditions which do not affect the property, but control only his relations to the organization, or to the individual members thereof. A sale by a member to a third party of a seat, would doubtless be held valid as between the parties, and if the purchaser failed to secure an election to the "Board," he in turn could transfer the "seat" to some person who could be elected.

The Bank of Utica vs. Smalley et al., 2 Cowen Rep. 770.

The "Board" itself cannot make a valid by-law providing absolutely that the property in the seat shall not be "transferable," without authority from the Legislature.

And such a "by-law," not affecting the property, even

if made, has no binding force upon creditors or third parties.

Lloyd vs. Loaring, 6 Ves. 773.
Austin vs. Searing, 14 N. Y.
Marquand vs. N. Y. Manuf. Co., 17 Johns. 525.

And the purchaser of such a "share" or "seat," or "privilege," or "property," or by whatever name it is rightly called, if denied admission, or the privilege of membership of the Board, would become a tenant-in-common therein, and as such would have a right to an account, and to the proportion of profit belonging to his "seat" or "share."

Kingman vs. Spurr, 7 Pick. 235.
Bradley vs. Holdsworth, 3 M. & W., 422.
Bligh vs. Brent, 2 Y. & C., Exch. 268.

Neither can there be a valid "Article in the Constitution," nor a valid "by-law" which, upon an election to the Stock Board, transfers to his possession, order, and disposition, the "seat" or "share" of a member conditional upon his bankruptcy, and in that event to be applied to the benefit of the members of the board, exclusive of outside creditors.

In the case at bar, the admitted fact that the bankrupt was a member of the Stock Exchange, and sold, assigned, and transferred his seat to the defendants, is evidence that he had absolute possession of the same. The assignment was made within four months of his being ajudicated a bankrupt, and as he held the "seat," placed in his possession and control, by virtue of his election to membership to, and signing the Constitution of the Stock Exchange, he held it subject, as he held his other property, to the Bankrupt Law.

The provision of the "Constiution" in the XV. Article is a contrivance to evade, and signing the same by each member is an express stipulation to exclude, so far as their business is concerned, the operation of the Bankrupt Act.

This contract between the members of the "Stock

Exchange" restrains each individual party to it from the alienation of his property. It is an attempt to preserve for themselves full and absolute control over, and power of forfeiting the property of each other, without regard to the interests of third parties.

An assignment of interest *to take effect in the event of bankruptcy is void.* It is an attempt to control the general law.

(*a.*) The owner of property may, on alienation, qualify the interest of his alience by a condition to take effect on Bankruptcy, but he cannot by contract or otherwise qualify his own interest by a like condition, determining it or controlling it by his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi* which for the first purpose is absolute, being in the latter instance, subject to the disposition previously prescribed by law.

Wilson vs. Greenwood, 1 Swant. 471, note.

On page 476, in the argument on the motion for a Receiver, the counsel say: "The stipulation for transferring the share of the bankrupt to his solvent partners, at a price fixed by valuation, and payable in the course of seven years, is contrary to the policy of the Bankrupt Law. No man can effectually contract for a disposition of his property *in an event which deprives him of all his disposing power.* An absolute owner may undoubtedly annex to a *gift* terms at his discretion, he may direct, as in Dommett vs. Bedford, 6 T. R. 684, that the enjoyment shall continue during the solvency, and cease on the bankruptcy of his donee, but has it ever been decided that he could by contract control the disposition of his property in the event of his own bankruptcy? On the contrary, in questions arising on marriage settlements, providing that a benefit secured to the husband shall cease on his bankruptcy, a distinction has constantly prevailed, and validity is given to that provision to the extent only of the property of the wife."

And in the matter of Meaghan, 1 Sch. and Let. 179:

it is said: "It is contrary to the policy of the law to allow a man to settle his own estate so as to give himself an interest to cease on his bankruptcy, and *it is immaterial* in a *case of this sort, that the provision for the cessor of the interest* is followed by a limitation over in favor of the settlors wife and children, or of any other person."

Higinbotham vs. Holme, 19 Ves., 88.
Phipps vs. Ennismore, 4 Russ., 131.
Whitman vs. Mason, 2 J. & H. 204; 8 Jur. (N. S.) 278.
Ex parte Baddam, 2 D. F. & J., 625.

And in like manner, and upon the same principle, a man cannot contract for the payment of sum of money in the event of his bankruptcy, or to give an additional security to his creditor.

Tripp vs. Armitage, 4 N. & W. 687.
Ex-parte Mackey, L. R. 8 Ch. App., 643.
Robson on Bankruptcy, 3 Edm., 395.

"A bond by a husband to pay a sum in the event of "his bankruptcy or insolvency is fraudulent against "creditors."

Ex-parte Cook 8 Vesey, 353 and note to same case in Sumners Edn. of 8 Vesey Jr. p. 357, I.
Ex-parte Hodgson 19 Ves. 205.
Ex-parte Young, 3 Madd. 124–130.
In the matter of Murphy, 1 Sch. & Lef. 44.

On page 180 the Lord Chancellor says: "This is a "bond, which is a debt due, and nothing fraudulent is sug- "gested but one stipulation, namely, as to the interest in "case of insolvency. In England, where a provision of "this kind is confined to the property of the wife it is "considered fair; but when it goes beyond that and at- "taches on the property of the husband it is held to be "fraudulent, because no bounds can be set to it; if a "trader can make a provision of this sort to the amount "of £1,000, he may do so to the amount of £100,000.'

And in Higginson vs. Kelley, 1 Ball & B. 252, it is held that a "Marriage settlement of a trader securing "a provision in case of bankruptcy, for the wife, is "good to the extent of *her* property."

If the assignment be conditional, and the condition have not happened before the bankruptcy, the assignment will be defeated by that event, and will not take effect even though the condition afterwards happen.

Burn vs. Caralho, 1 A & E., 883.

(*b.*) An attempt is made to construct from the provisions of the "Constitution and By-Laws, and by the acts of the bankrupt and his co-members of the Stock Exchange, some "pledge," or "mortgage," or "assignment" or lien," either legal or equitable, or actual or personal, of and upon the seat of each co-member, which may avail in this proceeding, to evade the provisions of law. If any such arrangements exist they are secret and at variance with the apparent ones, as they appear on the record, and are to the injury of third persons, and so are against public policy and void.

Kelly vs. Scott, 49 N. Y., 595.

And if these "liens" exist, they are conditional upon and do not take effect until after the bankruptcy, and so are void.

The transaction has none of the marks of pledging of the seat. The possession of the "certificate" remained in the control of the bankrupt.

Pinkerton vs. Man. & Lawrence Railroad 1 Am. L. Reg. (N. S.) 96.
Story on Bailments §§§ 287, 288, 297.
Ryal vs. Rowles, 1 Ves. Sr, 348, 1 Atk. 165.
Lallande vs. Ingram, 19 La. Ann. 364.

Neither can it be held that the "seat" was mortgaged to each co-member by signing the "Constitution and By-Laws," for the reason that at the time there was no "ad-

vance" nor present debt or sum due. And what if any consideration there was which would charge this "seat" with the rights of a "pledgee" or "mortgagee" was for a future indebtedness, and the "pledge" or "mortgage" was conditional upon the bankruptcy of the co-member.

Almy vs Wilbur, 2 Woodby, & M. 371.

Ex-parte Ames, Re McKay and Aldus, 1 Low, Dec. 561.

McLean, Assignee vs. The Lafayette Bk. 3, McLean's R. 185.

Where a company is formed by act of Parliament for the purchase of lands to make a canal, and the act declares "that the shares shall be deemed personal estate, and shall be transmissable as such," it was held, that though the profits arose cut of land, the shares were personal property, passing as such to the assignees, on the bankruptcy of a proprietor.

"Where an act prescribes certain forms in the transfer of such shares, held, unless they are strictly complied with, the shares remain in the order and disposition of the bankrupt proprietor, *the ordinary mode of transfer not constituting an equitable mortgage.*" "And though the act only expressly relates to transfers between third parties, yet it impliedly relates to where the company are the transferees."

Ex-parte Lancaster Canal Company, 3 Deac. & Ch. 411.

Secret liens are inoperative against an assignee in bankruptcy.

Brock vs. Terell, 2 Bankr. Reg. 190.

They are not allowed to National Banks. Bullard vs. Bank, 18 Wall, 589. Nor to manufacturing corporations.

Mass. Iron Co. vs. Hooper, 7 Cush. 183.
Steamship Dock Co. vs. Herons Adm., 52 Penn. St. 280.

The Equitable lien, if any, which the co-members of the Board had, as individual creditors, upon the share of the bankrupt, was the same as that of any other separate creditor. Their contract to take that "share" or "seat" to themselves cannot be held to be valid so far as it over-rides the interests of third parties without notice, or the general principles of the Bankrupt Act. The "seat" was, at the time of the Bankruptcy, in the order and disposition of the Bankrupt, with the consent of his associates.

Exparte Caldwell, L. R., 13 Eq. 188.
Storys Eq., Juris. § 1038, n. (2), 12th Edn.

And any "equitable" security it is attempted to find in this contract in favor of a co-member, depends for its validity upon the character of the contract itself.

If that be found to be contrary to law, in its relation to the interest of third parties, and for that reason to fail in its intent, any "equities" claimed by the co-members to arise therefrom, must fail with it.

In the case, at bar, the assignees of the bankrupt co-members of the Board, sold the seat, his separate property, received the price for it, $10,000, and instead of paying it over to the assignee in bankruptcy, who represents not only the bankrupt but also all his creditors, they divided it pro-rata among themselves and a few other creditors in an association in which they and the bankrupt were co-members, there being no just claims on the part of the Board itself. Such a disposition of the private and separate estate of a partner is invalid.

If one partner takes a security upon his co-partners share of the partnership, for a private loan from the former to the latter, in a certain capacity not relating to the partnership, and he allows the mortgagor to continue to

act as an ostensible partner, his security will not, as to chattels comprized in it which are within the doctrine of reputed ownership, on the bankruptcy of the latter prevail against the trustee, and in such a case it is immaterial that the security is made to a trustee for the solvent partner.

Ryall vs. Rowles 1 Ves., 375; 1 Atk., 164.
Robson on Bankruptcy, 3d Edn., 640.

The lien of a partner as against the share of his co-partner, will extend to whatever may be due to such partner from his co-partner as a member of the firm, but not to what may be due in respect of a loan from one partner to another in a separate capacity unconnected with the partnership.

Ryall vs. Rowles. Ibid.
Croft vs. Pyke, 3 P. Wms., 180.
Robson, 665.

A separate partner has no equity which will give him priority over other separate creditors of his debtor.

Hill vs. Beach 1 N. J., Eq. Rep. (Beasley) 31.
Uhler vs. Semple, 5 C. E. Green (20 N. J. Eq.), 288.

A provision in a deed of partnership that, in the event of the bankruptcy or insolvency of a partner, his share in a mining lease, forming part of the partnership property, shall go over to his co-partners, is void, as being in fraud of the bankrupt laws.

Whitmore *vs.* Mason, 2 J. and H. (Eng.), 204.

The same principles are applicable to any alleged right of special lien by a part owner of a ship upon the share of his co-owner.

Nicoll vs. Mumford, 4 John. Ch., 522.
Rodrignez vs. Heffernan, 5 do., 417.

Merrill vs. Bartlett, 6 Pick., 46.
Ex parte Christie, 10 Ves., 104.

The Bankrupt may have violated his engagements with his associates by transferring his interest, but we are not called upon, in this action, to consider that point. Third persons claim his interest in the "share" or "seat" in the Stock Exchange, and are entitled to receive it if their partnership is at an end. It is well settled law, that an act of Bankruptcy is a dissolution of partnership; this is by reason of the assignment, which severs the interest of the Bankrupt by operation of law.

Marquand vs. N. Y. Man. Co., 17 John. R., 525.

And where A, a trader and an officer in the East India Company's service, assigned his privilege, consisting of shipping goods from the East Indies to England, to B, for a valuable consideration; and, in order to evade the bylaws of the East India Company, which prohibits such assignment, the goods were shipped, entered, warehoused, and sold by the Company in A's name, and the proceeds carried to his account, but before A received these proceeds from the Company he became a bankrupt, it was held that his assignees were entitled to recover the amount in an action for money had and received against the East India Company, who retained the same; this being such a possession of goods and chattels in the bankrupt as falls within 21 Jac., 1 c. 19 s., 11.

Gordon, assignee, etc. vs. The East India Co.
7 Term. R. 228.

SIXTH POINT.

The case of Nicholson *vs.* Gooch, 5 Ellis and Bl., 999, was cited below, in behalf of defendants.

That case was brought under a law which did not declare assignments and payments made, within four months of the adjudication, in contemplation of insolvency

and in fraud of the Bankrupt Act, *null and void.* Such assignments, &c., were only acts of Bankruptcy.

There was no provision in that act similar to § 35 of the United States Bankrupt Act.

There are differences also in the *facts*, in the two cases, which will make apparent the inapplicability of that case here. That was an action to recover from the official assignee of the Royal Stock Exchange the "differences" received and paid out by him for the bankrupt upon the "settling day," which occurred before there was an adjudication.

Therein, p. 1,000, "by the case it appeared that Lodge was admitted a member of the Stock Exchange, or, as it is called, 'The House,' subject to its rules and regulations," the effect of which was:

1. That a member of The House unable to fulfill his engagements is to be declared a defaulter.

2. That members who were under engagements to pay money to such defaulter did *not* pay to him, but to the official assignee appointed by the Stock Exchange.

3. That these official assignees were to distribute the proceeds rateably among the members of The House to whom defaulter was under engagements.

And the decision rests upon the facts:

1. That one of the *official* assignees of The House received the balances due the bankrupt.

2. That *he* paid them over to members, "*in implicit obedience*" to the rules of The House,

3. *Before* any *notice* of the bankruptcy of Lodge.

The rules of the Eng. Stock Exchange find their parallels in the Constitution of the S. F. Stock Board, and according to which Fenn, being delinquent, *should have* been suspended, "*in implicit* obedience" to the Constitution. *After* a *suspension* of *six months*, "without satisfactory settlement," his seat would then become the property of the Board, or the creditors therein.

Herein, 1. Fenn, though delinquent, was not suspended under the Constitution.

2. The creditors, therefore, under the Constitution, had *no* right to his seat.

3. The money was not received by any official assignee of the Board, nor by any agent of the Board, but by assignees of bankrupt's own choosing.

4. The moneys do not appear to have been paid over to members of the Board under any direction of the Board.

5. Nor were any of the proceedings in compliance with the Constitution, nor is it so alleged, save in the pronounced violation of the express provisions of the Bankrupt Act against paying the money to "inside creditors' exclusive of outside creditors."

6. Nor was it paid over *before notice* of Fenn's insolvency, but with full knowledge of it.

In the English case, the defaulter had given the Exchange power to act in case he became a defaulter; but here the bankrupt had signed a Constitution by which he had agreed that he would *allow* the *Board* to *sell* his seat, and then did not keep his agreement, but sold it *himself*, through his agents, the defendants, (who, being his creditors, would not pay back the money to plaintiff.

This seems to destroy the analogy of the two cases as to the rules of the Boards and the action under them.

Moreover, under the English Bankrupt Act in the language of Sir F. Thesiger, for defendant in that case, p. 1009, if "the payments to Gooch (defendant) were by way of fraudulent preference, and so voidable at the option of the assignees, they would be voidable only, not void.

The § 35 of the U. S. Bankrupt Act, makes all preferences absolutely void, not voidable only.

The same counsel for defendant, therein also admits, that under the 223d Section of the English act, (which was invoked in that case), "there can be *no* relation back *before* adjudicatian."

Section 35, provide espressly for "relation back before adjudication," 4 & 6 mos.

The same counsel favors the conditions of this case in his statement of the law, when he says on p. 1010 that in that case "there was no fraudulent preference, for Lodge, (the bankrupt) had long before given authority

to the Stock Exchange assignees to take his House debts in case he became a defaulter. His act was therefore not voluntary; and that is essential to making it a fraudulent preference."

The act of Fenn herein was voluntary, and kept pace with his delinquency, for he assigned his seat for sale on the day he failed, August 24, 1872.

If he and the defendants had not been so fast, it is possible there might have been a sale and receipt of proceeds, under the constitution of the Board.

Lord Campbell, in uttering the decision above, divides the claim of plaintiff into two parts. The first he rests upon this statement, p. 1010: "This adjudication proceeding on the 223d section of the Bankrupt Law Consolidation Act, 1849, the title of the assignees *cannot relate* to any prior act of bankruptcy; and the money had been *bona fide* paid over by the defendant *before any notice* of any act of bankruptcy."

* * * * * * *

At the time when he (defendant) received it Lodge must still be considered *sui juris*," etc.

"It, therefore, vested in them, the assignees," Lord Campbell continues, "subject *to be* devested by the assignees in bankruptcy." The decision plainly rests upon the fact of payment, *without notice*, and that under the English law the payment was *voidable* only, and not absolutely *void* as under the U. S. Act."

Under the law and facts of that case we could not contend against Lord Campbell's decision, but must say that in defendant's hands it never was money received to the use of the assignee, and we are not now contending against that *decision*, but only against its *applicability* here. And we say that under the law and facts of this case defendants could not defiantly and in the face of the Bankrupt Act make payment to members of the Board who might or might not be responsible, and tell the plaintiff to go seek the money in their hands.

The second part of the case Lord Campbell rests upon Sir John Barnard's Act, p. 1016, and says: "We are *bound* to give effect to this statute, and *therefore* as to the whole of the sum sought to be recovered to pronounce judgment for the defendant."

Since the above decision the Act 23 and 24 Vict. was passed legalizing "stock jobbing," and if the English Bankrupt Act contained a provision similar to § 35 of the U. S. Bankrupt Act, and the action be tried again, it is a fair inference that the decision would have been in favor of the plaintiff.

SEVENTH POINT.

Concerning the proceeds there can be no testimony admissible tending to show that they are not in the possession of defendants, but have been paid out by them, for they sold the property of the bankrupt, knowing him to be insolvent, and confessed to receiving $10,000 gold, to the possession of which the assignee in bankruptcy *alone* is entitled. They applied the money illegally in following the directions of the bankrupt, and cannot set up as defense that they have so applied it.

Townson vs. Wilson, 1 Camp., 396.
Chappell vs. Poles 2 M. & W. 867.

EIGHTH POINT.

The position of the appellants being well taken, that of the Court below is a mistaken one; the action is well brought and the judgment should be reversed.

EDWARD B. MERRILL,
of Counsel.

GEO. B. MERRILL,
Attorney for Plaintiff.